It follows from that passage that the plaintiffs' statement of claim is, in paragraph 3, faulty, is not sufficiently explicit and detailed, and requires amendment. However, I consider it would be wrong to find that the present paragraph 3 must be taken to allege an oral guarantee. It specifies neither an oral nor a written guarantee. The passage from *Halsbury* just quoted says that it must be stated in pleadings whether a contract is oral or in writing; these pleadings say nothing as to which it is. It can then just as well be argued that because it is not said to be oral it must be taken to be in writing, as that because it is not said to be in writing it must be taken to be oral.

It is my opinion and judgment, accordingly, first, that the second defendant was not entitled to presume from the wording of the present paragraph 3 that the plaintiff was alleging only an oral guarantee, and would put forward no written evidence of the guarantee alleged, and second, that the proposed amendment, if made, will not deprive him of an immunity he had and will not deprive him of a defence available to him on the pleadings as they stand.

To return now to Order 28 rule 1, it does seem to me that the amendment of paragraph 3 asked for is necessary for the purpose of determining the real question in controversy between the parties, that is — in this matter — between the plaintiff and the second defendant. I may add that the passage quoted from paragraph 23 of volume 30 of *Halsbury* goes to show that some such amendment as this must be made for the pleadings to be in order. In fact the second defendant might well have asked for further and better particulars of what is stated in paragraph 3.

The plaintiffs' application for amendments is allowed, and the statement of claim is amended accordingly.

Application allowed.

YONG KUAN TEIK v. DEVAN NAIR

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Tan Ah Tah F.J.) May 13, 1965]

[K.L. — Federal Court Civil Appeal No. 95 of 1964]

Election — Petition — Failure to comply with rule requiring service of notice of presentation of election petition within ten days — Whether mandatory — Jurisdiction to strike out petition — Election Offences Ordinance, 1954 Part VII — Election Petition Rules, 1954.

This was an appeal from the decision of the judge who struck out an election petition on the ground that the provisions of rule 15 of the Election Petition Rules, 1954, which require service of notice of the presentation of the petition within ten days, had not been complied with ([1964] M.L.J. 456).

Held: (1) the trial judge had no power to strike out the petition for non-compliance with rule 15 of the Election Petition Rules, 1954, as there was nothing in the Election Offences Ordinance, 1954, or the rules which gave him power to do so;

(2) the rules, particularly those dealing with the disposal of election petitions, are more clearly analogous to rules relating to the performance of a public duty than to rules affecting the rights and obligations of individuals and as such are to be treated as directory and not as of such a nature that non-compliance with them affects the validity of acts done.

Cases referred to:—

(1) *Williams* v. *Tenby Corporation* (1879) L.R. 5 C.P.D. 135.

(2) *Goonesinha* v. *de Kretser* [1945] A.C. 63.

(3) *Coppock* v. *Bower* 4 M. & W. 361, 366.

(4) *Theberge* v. *Laudry* (1876-7) 2 App. Cas. 102, 106.

(5) *Strickland* v. *Grima* [1930] A.C. 285, 296.

(6) *Hartlepool Election Petition* (1869) 19 L.T. 821, 822.

(7) *County of Durham (North Division) Election Petitions* (1874) 31 L.T. 321.

(8) *Montreal Street Railway Co.* v. *Normandin* [1917] A.C. 170, 175.

FEDERAL COURT.

V. K. Palasuntharam for the appellant.

Yong Pung-How for the respondent.

Thomson L.P.: This is an appeal from a decision of the High Court at Seremban whereby an election petition under the Election Offences Ordinance, 1954, was ordered to be struck out.

The matter arises out of the Parliamentary Election held last year. The petitioner, the present appellant, is a person who voted in the election for the Bungsar constituency in Kuala Lumpur at which the present respondent was returned as duly elected.

The result of the election was published in the *Gazette* on 11th June, 1964 (Notification No: 2234) and on 29th June, 1964, that is within the period of 21 days prescribed by section 38(1) of the Election Offences Ordinance, the appellant filed an election petition asking that it be determined whether or not the respondent was duly elected or returned on the ground that at the time of the election he was not a citizen of Malaysia. And here I would pause to observe with all possible emphasis that at no time has there been any shadow of a suggestion of any impropriety on the part of the respondent or his supporters.

The respondent after his return had not furnished the Registrar of the High Court with an address for service, which he is permitted but not required to do under rule 10 of the Election Petition Rules, and on ascertaining this fact the appellant proceeded to serve notice of the presentation of the petition under the provisions of rule 15 of the Rules by publication in the *Gazette*. That notice which was dated 13th

July, 1964, was published in the *Gazette* on 23rd July, 1964 (Notification No: 3008), that is to say some 14 days after the expiration of the period, prescribed by rule 15, of 10 days from presentation of the petition.

A few days later the respondent filed a notice of retainer of solicitors and on 6th August his solicitors took out a summons for an order for further and better particulars. Two days later the appellant's solicitors retaliated with a summons asking for liberty to administer interrogatories. Both these summonses came on for hearing on 17th August when the summons for interrogatories was adjourned and an order for particulars as prayed was made by consent.

On 24th August the appellant's solicitors filed the required particulars and a copy of these was served on the respondent's solicitors at 3.15 p.m. the same day. The following day the respondent's solicitors took out a summons to have the petition struck out on the ground that notice of presentation had been served on the respondent out of time.

In the event the judge took the view that the provision of rule 15 requiring service of notice of presentation within 10 days was mandatory and that failure to comply with it was not a mere irregularity that was capable of being waived by the other party. Following the case of *Williams* v. *Tenby Corporation* [1] he held that compliance with the rule was a condition precedent to the right to petition. The condition had not been fulfilled and accordingly he was obliged to strike out the petition.

Against that decision the appellant has now appealed.

The law in this country relating to election petitions is contained in Part VII of the Election Offences Ordinance, 1954, and the Election Petition Rules, 1954.

Section 34 of the Ordinance provides that an election petition may be presented to the High Court by persons of certain specified classes having an interest in the election to which the petition relates. By section 33(1) such petitions are to be "tried" by the Chief Justice or by a judge of the High Court nominated by him for the purpose who is called the Election Judge, but by section 33(4) interlocutory matters connected with a petition may be dealt with and decided by any judge of the High Court.

Section 38 provides that the petition shall be presented within 21 days (in certain cases 28 days) of the publication of the result in the *Gazette*.

The reliefs which may be claimed are set out in section 35. These are declarations that the election in question is void, that a person returned should not have been returned or that a candidate not returned should have been returned and a scrutiny of votes. By section 36 the Election Judge is required to determine the questions raised in the petition and to certify his determination to the Election Commission or to the Head of State concerned who is required to take action in terms of the determination.

Finally, section 42 provides that the procedure and practice on election petitions is to be regulated by rules of court, and that, until varied or revoked by rules of court, the rules contained in the Second Schedule to the Ordinance shall be in force.

The rules contained in the Second Schedule have not been varied or revoked and are still in force. Those of them which are relevant here are as follows.

Rules 1 to 9 deal with the filing and content of petitions. Rule 10 enables (but does not compel) a person returned at an election to provide an address for service prior to the presentation of any petition to which he may be a party. Rules 12 to 14 deal with the giving of security for costs by the petitioner. In particular rule 12(1) requires that such security shall be given by the petitioner at the time of presentation of the petition or within three days afterwards and rule 12(3) provides that if security "as in this rule provided" is not given no further proceedings shall be had on the petition and the respondent may apply to the Election Judge for an order directing its dismissal. Rule 15 requires notice of the presentation of the petition to be served on the respondent within ten days of such presentation, but it is to be noted that the rule does not contain, as does rule 12, provision that the petition is to be dismissed for non-compliance.

Rules 21 to 28 deal with withdrawal or abatement of the petition. Rule 21 provides that a petition may not be withdrawn without the leave of the judge and then only on proof that no unlawful agreement or undertaking has been given in relation to the withdrawal. Rule 22 prescribes the form of application for leave to withdraw and rule 23 provides for notice of it to be served on the respondent and published in the *Gazette*. Rule 24 provides that any person who might have been a petitioner in respect of the election to which the petition relates may apply to be substituted for the petitioner and rule 26 provides that the judge may make such a substitution. Rule 27 provides that on the death of the petitioner the petition shall be "abated" but rule 28 provides for the publication of notice of abatement as in the case of withdrawal and contains provision for any person interested to be substituted for the deceased as petitioner.

Finally, rules 29 and 30 provide that the

death or withdrawal from the proceedings of the respondent shall not abate the petition but it shall continue irrespective of whether or not any person is substituted as respondent and that in the case where the respondent has given notice not to oppose he shall not be allowed to take any further part in the proceedings.

Now the jurisdiction to deal with election petitions created by the Election Offences Ordinance, 1954, is clearly vested in the High Court in Malaya and not in any specially created "Election Court". That result follows from the course of reasoning of the Privy Council in relation to the similar provisions of the law of Ceylon as stated in the case of *Goonesinha* v. *de Kretser* [2] which it is unnecessary to repeat here.

From the proposition that the jurisdiction to deal with election petitions is vested in the High Court it can be argued with some plausibility that any *lacunae* in the rules relating to the exercise of that jurisdiction can be filled by referring to the general rules of court. And in consequence it has been argued that the present case falls within the scope of Order 70 rule 2 which provides that no application to set aside any proceeding for irregularity shall be allowed if the party applying has taken any fresh step after knowledge of the irregularity.

The main ground of appeal has been based on that argument; it has been said that by his conduct the respondent has waived compliance with rule 15. The argument is attractive and certainly if the provisions of rule 15 were capable of being waived they clearly were waived by the respondent when instead of immediately asking for the petition to be struck out he took steps to carry on the litigation by asking for further and better particulars. In any ordinary civil proceeding that would probably have been conclusive. The argument, however, overlooks the very special and distinctive nature of the jurisdiction with which we are concerned.

It is not a jurisdiction to deal with the rights and obligations of individuals as in the ordinary civil jurisdiction of the court. It is a jurisdiction to deal with matters affecting on the one hand the integrity of the country's legislature and on the other hand the representation in that legislature of constituencies comprising many thousands of electors. As was said by Lord Abinger C.B., in the case of *Coppock* v. *Bower* [3] an election petition "is a proceeding instituted not for the benefit of the individuals, but of the public — and the only interest in it which the law recognises, is that of the public".

In that connection I would quote the following observations of the Privy Council (*per* Lord Cairns) in the case of *Theberge* v. *Laudry* [4] with reference to the corresponding and largely similar legislation in the then Colony of Quebec:—

> "These two Acts of Parliament....are Acts peculiar in their character. They are not Acts constituting or providing for the decision of mere ordinary civil rights; they are Acts creating an entirely new, and up to that time unknown, jurisdiction in a particular court of the colony for the purpose of taking out, with its own consent, of the Legislative Assembly, and vesting in that court, that very peculiar jurisdiction which, up to that time, had existed in the Legislative Assembly of deciding election petitions, and determining the status of those who claimed to be members of the Legislative Assembly."

And again at page 107:—

> "the subject matter, as has been said, of the legislation is extremely peculiar. It concerns the rights and privileges of the electors and of the Legislative Assembly to which they elect members. Those rights and privileges have always in every colony, following the example of the mother country, been jealously maintained and guarded by the Legislative Assembly."

Much the same thing was said half a century later in the case of *Strickland* v. *Grima* [5] in relation to the corresponding law in Malta, where Lord Blanesburgh referred to *Theberge* v. *Laudry, supra,* and said that that "it is pointed out that decisions upon such matters are not decisions of mere ordinary civil rights."

Again it is clear that our Ordinance is based on, though it does not follow in every detail, the law in the United Kingdom which is contained in sections 107 *et seq.* of the Representation of the People Act, 1949, which replaced the Parliamentary Elections Act, 1868, and here it will be desirable to glance briefly at the history of the United Kingdom law.

The British House of Commons has always been jealous of its privileges and among these it has consistently claimed the right of providing for its own Constitution and in particular the right to decide questions of disputed elections. Before the Parliamentary Elections Act of 1770 questions as to disputed elections were tried and determined by the whole House (see *Erskine May* "Parliamentary Practice", 16th Ed., p. 184). After the 1770 Act petitions relating to such questions were referred to committees of the House. This proved unsatifactory and various experiments were tried in the way of appointing bodies of independent commissioners to investigate and to report to the House on such petitions. Ultimately by the Act of 1868 this duty of investigating and reporting was handed over to the judges.

In practice most elections were disputed on grounds of alleged acts of bribery and corruption and it was thought to be one of the weaknesses of the various methods of dealing with election petitions before 1868 that they provided too many opportunities for the hushing up of scandalous matters which in the public interest should be brought into the open (see *Holdsworth* "History of English Law", Vol. XIV,

p. 161 *et seq.*). And it would seem reasonably clear that this is the mischief aimed at by the United Kingdom provisions of the legislation placing difficulties in the way of withdrawing and abating election petitions.

Support for this view is to be found in the earlier election petition cases. In the case of *Hartlepool Election Petition* (5) Blackburn J. said that withdrawal of a petition "might in some cases very well be the means of cloaking or concealing an attempt to stifle an inquiry where an inquiry ought really to be made". And again in the case of *County of Durham (North Division) Election Petitions* (7) Grove J. said this:—

"The withdrawing of an election petition must be by leave of the judge, and if the judge saw that the withdrawal was the result of any compromise, of any giving and taking so as to prevent evidence being brought forward, which ought to be brought forward, not in the interest of either of the parties, but in the interest of the constituency, and of purity of election, the judge ought not to allow a petition to be withdrawn; he ought as far as he would have power to do so, to insist upon the petition being proceeded with."

It may be a far cry in more senses than one from Eatanswill to Bungsar but similar provisions have been inherited in our own legislation and these should be approached as having in view the same mischiefs. That strongly supports the view that under our Ordinance and rules once an election petition has come into existence it can only be disposed of in some way which the legislation itself permits and, that any rules, written or conventional, relating to the exercise by the court of its ordinary civil jurisdiction are to be disregarded. On this basis the circumstances in which a petition can be disposed of are clear. Normally it will be disposed of by the Election Judge making his report upon it in accordance with the provisions of the Ordinance. Apart from that the only specific provisions which enable it to be disposed of are those relating to withdrawal and abatement subject to supervision of the court and the provision of rule 12 enabling the petition to be struck out if security for costs is not given within the prescribed time. Clearly, too, the provision of rule 16 that on the expiration of time limited for making petitions "the petition shall be deemed to be at issue" indicates the point of time at which the petition becomes incapable of being disposed of except in one of the ways which have been mentioned.

It would therefore follow that the trial judge had no power to strike out the petition for non-compliance with rule 15 because there was nothing in the Ordinance or the rules which gave him power to do so.

Before departing from the case something should be said with regard to the case of *Williams* v. *Tenby Corporation, supra,* which appears to occupy a somewhat isolated position in our legal literature. That case was concerned with an election petition under the Municipal Elections Act, 1872.

That Act provided for dealing with disputed municipal elections by way of election petitions. Section 13 governed the presentation of such petitions. Section 13(2) required the petition to be presented within 21 days of the election, section 13(3) required that security for costs should be given within 3 days of presentation and section 13(4) required notice to be given to the respondent within 5 days of presentation.

In the *Tenby* case a petition was presented within the required time but security and notice were not given within the required periods and on these grounds the petition was struck out. An appeal against that decision was dismissed. It was held that the provisions of the Act, including those of sub-sections (3) and (4) of section 13 were peremptory and were "conditions precedent, which ought to be complied with before the petition could be presented".

It is not necessary to discuss in detail the course of reasoning which led to the result in that case because the case is by no means on all fours with the present one. In particular there is one difference between the United Kingdom Act of 1872 and our own Ordinance. In the United Kingdom Act the requirements as to notice and costs are contained in the body of the Act itself and are clearly on the same footing as the requirement that the petition itself must be presented within 21 days. In our Ordinance, however, while the requirement that the petition must be presented within 21 days is contained in the Act itself (section 38) the requirement as to notice of presentation are contained in the rules which in terms regulate "practice and procedure" (section 42). In other words the requirement that the petition must be presented within 21 days is a condition precedent to the exercise of the right to petition; the rules, however, do not touch on the right to petition but only affect the way in which the petition is to be dealt with once the right to present it has been exercised and it has come into existence. Moreover these rules, particularly those dealing with the disposal of election petitions, are much more clearly analogous to rules relating to the performance of a public duty than to rules affecting the rights and obligations of individuals and as such are to be treated as directory and not as of such a nature that non-compliance with them affects the validity of acts done (see *Montreal Street Railway Co.* v. *Normandin* (8)).

I would allow the appeal with costs.

Barakbah C.J. (Malaya) and **Tan Ah Tah F.J.** concurred.

Appeal allowed.

Solicitors: *Rajendra & Teik Ee; Shook Lin & Bok.*